VERONICA JOSEPH & ANOR.

v.

TU KON LIN & ANOR.

HIGH COURT MALAYA, MALACCA
WAN YAHYA J
[CIVIL SUIT NO. 97 OF 1979]
21 JULY 1986

TORT: *Negligence - Contributory negligence - Claim for dependency - Civil Law Act 1956 - Section 7 - No claim on behalf of the estate of the deceased - Section 8 - Whether sum awarded to the plaintiffs can be reduced in proportion to contributory negligence - Section 12(1) - Whether a finding of contributory negligence can be made against the deceased.*

DAMAGES: *Dependency - Assessment of quantum.*

Theresa Fernandez, a 44 year-old married woman, was about to cross the road in front of the Government dental clinic, when the defendant riding a motor cycle ran over her. After her death, her two infant daughters, by their father and next friend, brought an action for dependency claim against the defendant under s. 7 of the Civil Law Act 1956 ("the Act"). No claim was made on behalf of the estate of the deceased under s. 8 of the Act.

The plaintiffs' case is that the deceased was waiting in the middle of the road for the traffic to pass by, before crossing the road. The defendant who was riding his motor cycle closely behind a car, could not see the deceased and proceeded to overtake it from its right side. In this process he knocked into the deceased.

The defendant gave a different account of the accident. He stated that he was trailing 30 to 40 feet behind a car when a school girl suddenly emerged from his left and ran across the road. As it all happened so suddenly he could not avoid colliding with the deceased. He contended that the deceased was also to be blamed of contributory negligence and deduction should be made out of the sum awarded to the plaintiffs.

The plaintiffs contended that once negligence was established, no deduction could be made for any contributory negligence. They stated that the claim made by them was a mere dependency claim in which the estate of the deceased was not a party and the defendant had failed to make the representative of the estate as a joint plaintiff or a third party. They also contended that no findings of a person's negligence should be made in that party's absence.

Held:

[1] Considering the circumstances and the evidence of the case, the deceased was liable to 20% contributory negligence.

[2] In a claim for dependency, the sum awarded to the plaintiffs can be reduced in proportion to the contributory negligence, but this will only apply where the action was brought for the benefit of the estate under s. 8 of the Act and not under s. 7 as in the present case.

[3] The Court should not make any finding of contributory negligence on the part of the deceased as she was neither a claimant, defendant nor a third party, in accordance with s. 12(1) of the Act, which provides that damages should only be reduced by the Court after considering the claimant's share for the responsibility of the damage. In the present case the claimants are the children and the contributory negligence was that of their mother.

[4] It would be openly flouting the principle of *audi alteram partem*, if the Court were to find the deceased liable for any degree of negligence without first giving her representative the opportunity to be heard, and the right to defend her action.

[5] The proper course for the defendant to take in such a case before resorting to the remedy for contributory negligence, is to make the estate of the deceased a party to these proceedings, either as a joint plaintiff or a third party.

[6] The plaintiffs were awarded a sum of RM17,100 in respect of the dependency claim.

[Judgment with costs to plaintiffs.]

Cases referred to:
Maxfield v. Llewellyn & Ors. [1961] 1 WLR 1119
Yeo Lian Hwa & Anor. v. The Hock Lee Amalgamated Bus Co. Ltd. [1961] MLJ 153
Joginder Kaur & Anor. v. Malayan Banking Ltd. & Anor. [1971] 1 MLJ 98
Chin Swee Lian & Ors. v. Tuan Chen Lown [1972] 1 MLJ 1viii
Stapley v. Gypsum Mines Ltd. [1953] AC 633
Mallett & Anor. v. Dunn [1949] All ER 973

Legislation referred to:
Civil Law Act 1956, ss. 7, 8, 12(1), 12(4)
Law Reform (Contributory Negligence) Act 1945 [UK], s. 1(1)

For the plaintiffs - R. Krishnan
For the defendants - A.C. Vohrah

JUDGMENT

Wan Yahya J:

Theresa Fernandez, a 44 year-old married woman, was tragically killed in a road accident almost at the door steps of her place of work. She was about to cross the road in front of the Government dental clinic when she was run down by a motor cycle ridden by the defendant. Her two infant daughters, Veronica Joseph and Pamela Joseph by their father and next friend, instituted dependency claim against the defendant, the motor cyclist who had collided into their mother and caused her death.

In their statement of claim, the plaintiffs alleged that on 16 April 1979 at about 7.30 a.m. the defendant rode his motor cycle negligently and caused the death of their mother who was on the road.

Presumably unable to get eye witness to the accident the plaintiffs had to rely on their pleadings, police sketch plans of the accident and various other documentary exhibits to support their claim. They were also able to elicit from the defendant's oral evidence facts which point favourably towards their case.

The plaintiffs' case, as it appears from the pleadings, sketch plans, documentary exhibits and also the defendant's oral evidence is that the deceased was standing at the middle of the road as one faces Pringgit waiting for the traffic to pass by before proceeding to cross the road to her place of employment.

At that unfortunate moment the defendant who was riding his motor cycle closely behind a car travelling on the same side of the road and therefore had no view of the deceased, proceeded to overtake this car from its right side, while so doing he collided and knocked into the deceased.

The defendant's version of the accident is somewhat contrastive. He claimed that he was trailing from 30 to 40 feet behind a car when a school girl suddenly ran across the road from his left. He said that as the incident occurred so swiftly he could not avoid running into her.

Of the two conflicting versions placed before me, I have no hesitation in rejecting defendant's account of the accident in preference to the plaintiffs for the following reasons:

According to the defendant, he was travelling at about 20 miles per hour at a distance of about 20 feet behind a motorcar. He could see deceased standing by the side of the lane at the edge of the road some 30 to 40 feet away and that after the car had passed her, she had dashed out across the road from that position. The point of impact in this instance appeared to be somewhere between the point D and D2 from the sketch plan i.e. at the beginning of the scratch mark made by the motor cycle falling and sliding on the road and measuring some 15 feet away from the side of the road. If this be the case, the claim by the defendant that deceased started running across when he was 6 to 8 feet away from her could not be true for two reasons-

Firstly, the nearest distance between her standing position at the edge of the road to the point of impact or in any event the defendant's onward path is, according to the sketch plan, about 15 feet. Secondly, when the deceased started to run from the edge of the road over a distance of 15 feet towards the point of impact, the defendant must have been about 18 feet or so from the same point. I find it difficult to accept that a 45 year old lady could have performed such an athletic feat as to outrun a motor cycle proceeding at 20 miles per hour as both the deceased and the defendant have to cover almost the same distance at precisely the same time to meet with the collision at the centre of the road.

Moreover I cannot accept the contention in defendant's police report that he was proceeding at 20 miles per hour when one of the scratch marks made by his motor cycle on the road had a record measurement of 28 feet 5 inches. Similarly I am unable to accept his story that he could only see the deceased at 30 to 40 feet when he was following the car at a distance of 20 feet away nor can I believe that the deceased was crossing the road from defendant's left side.

On the other hand the starting position of the scratch marks leading to the final position of the motor cycle on the road indicate that the impact must have taken place near the central white line where the deceased was said to have been standing. The plaintiffs' version that deceased was crossing from the left side as one faces Pringgit (and not towards the left as the defendant claimed) is more consistent with their claim that the deceased was on her way to work since the Government dental clinic is situated on the left side as one faces Pringgit. I therefore hold the defendant is mainly to be blamed for the cause of this accident.

On the issue of negligence, it is the plaintiffs' contention that once this is established no deduction could be made for any contributory negligence out of the sum awarded to the plaintiffs. They assert that the claim made by them is a mere dependency claim in which the estate of Theresa Fernandez (their deceased mother)is not a party and the defendant had failed to make the representative of the estate as a joint plaintiff or a third party. The plaintiffs further contend that no assessment or findings of a person's negligence should be made in that party's absence. I shall be reverting to this subject at a later part of my judgment but in case an assessment for contributory negligence is in order, I shall proceed to consider it now.

The deceased to my mind is not entirely blameless. She had chosen to cross the road when only one-half of it was safe enough for her to do so. In order to cross to the other half she had elected to take a certain amount of risk by waiting on the central white line until traffic on the other lane had cleared up. Any pedestrian who elects to cross a busy road (particularly one without an elevated road divider or a double-line) in two stages, by turning the crown of the road into his temporary safehold against passing traffic on both lanes, must be presumed to have known of the risk of being hit by a fast overtaking vehicle and is therefore liable to some measure of contributory negligence. The extent of negligence must, of course, be determined by various considerations such as the size and nature of the road, its location, speed restrictions, if any, and the volume of traffic passing along the road. In this particular case, after considering these factors, I would hold the deceased liable to 20% contributory negligence.

On the issue of quantum, it is in evidence that the deceased had been supporting her two children, Veronica, 16-year old and Pamela, 10-year old at the time of accident. Both were schooling and according to Veronica she was, at the date of hearing, contemplating on pursuing a course in cosmotology. This point was disputed by the defendant who suggested that she was a mere dropout, unqualified to enter into the university. The Counsel for the defendant impliedly submitted that her dependency should end at 18 years and not up to the level of tertiary education.

I am unable to share this view. In my opinion even a child of average intelligence is entitled to depend on her parents for the best available education which they can afford to give her.

The father of these children had retired at about the same time of their mother's death. According to him she had paid for most of the household expenses out of her RM445 per month salary and that he had only contributed RM100 per month towards such expenses. At times while serving overseas he had made a compulsory deduction of RM190 per month to be paid to his wife. A larger part of his pay had been utilised towards the hire-purchase payment of the family car and house. I have no reason to doubt his accounts of the family budget. It has been suggested to me by the defendant's Counsel that at most she could have contributed only about RM150 per month out of her entire salary towards her family expenditure. I do not share this view. As mentioned earlier, the deceased's husband had retired soon after her death. Although he had been drawing RM640 per month previously, after his retirement he only received a pension of RM352. I am convinced that had his wife lived she would have by reason of this changed financial circumstances contributed a larger sum towards the joint maintenance of her family. In my estimation, an amount of RM250 which is equivalent to about half of her RM445 would be a fair assessment of her potential contribution.

As to the question of her annuity, the deceased was 44 years and 6 months old at the time of her death. She was a dental nurse employed by the Government and as it is, with all Government employees, she could have worked right up to the age of 55. She was healthy and strong and was employed in a non-hazardous occupation. There was no reason why she could not work right up to that age. However, taking into consideration the normal contingency of earlier death, I would consider her annuity prospect at 8 years. The loss of dependency of her children will therefore be computed at RM250 on an 8-year multiplier which according to the actuary tables would add up to RM17,054.40 or to round it up at RM17,100.

During the course of the trial, Counsel for plaintiffs raised an interesting point of view i.e., whether in a dependency claim, in which the deceased mother or the administrator of her estate has not been made a party, the defendant is entitled to have the sum awarded to the plaintiffs reduced in proportion to the contributory negligence of the deceased mother. Counsel for the plaintiffs relied on the case of *Maxfield v. Llewellyn & Ors.* [1961] 1 WLR 1119 in which it was held that the Court in considering the contributions recoverable from any person responsible for the damage must have regard to the parties who were before the Court, whose share of damage could be taken into account, and who had an opportunity of being heard in the action.

For the defendant, it was submitted that this case does not apply as it relates to contribution and not contributory negligence. Counsel then cites s. 12(4) of the Civil Law Act 1956 (Revised 1972) which reads as follows:

> Where any person dies as the result of his own fault and partly of the fault of any other person or persons and accordingly if an action were brought for the benefit of the estate under s. 8, the damages recoverable would be reduced under subsection (1), any damages recoverable in any action brought for the benefit of the dependants of that person under s. 7 shall be reduced to a proportionate extent.

I agree with Counsel that benefit to the dependants can be reduced to proportionate extent but this will only apply where the action was brought "for the benefit of the estate under s. 8, of the Act" and not as in the present case under s. 7. This section will not relieve the defendant from joining the administrator of the estate as a party if he wishes to establish contributory negligence on the part of the deceased. Counsel then cites various authorities to show that our Courts have allowed proportionate deductions. However, in some of the cases cited by the defendant's Counsel, it can be seen that the deceased was represented by his personal representatives. In the other remaining cases, it is impossible to ascertain from the reports whether the legal representatives were or were not made a party to the suits.

In the case of *Yeo Lian Hwa & Anor v. The Hock Lee Amalgamated Bus Co. Ltd.* [1961] MLJ 153, Ambrose J did mention at p. 154 that the action was by the legal representative of the deceased for the benefit of his estate. Similarly in *Joginder Kaur & Anor v. Malayan Banking Ltd. & Anor* [1971] 1 MLJ 98 at p. 100, it is discernable from Ali FJ's judgment that the claim was by the deceased's widow and administratrix of his estate. The other case *Chin Swee Lian & Ors v. Tuan Chen Lown* [1972] 1 MLJ 1 viii contained no reference to this issue.

The case *Stapley v. Gypsum Mines Ltd.* [1953] AC 633 although seemingly relevant must be distinguished from our present case. In this case two miners, Stapley and Dale, disobeying the expressed instructions of the foreman of Gypsum Mines continued to carry out certain dangerous operations which resulted in Stapley being killed. The widow of Stapley sued Gypsum Mines. The trial Judge held both Stapley and Dale to be equally blameable and he ordered the Mine as Dale's employer to pay 50% share of Dale's negligence. The Appeal Court held that Dale's negligence did not cause or contribute to Stapley's death and that deceased was fully responsible for his own death. The House of Lords restored the trial Court's finding but held that Stapley was 80% and Dale 20% liable for the accident. The House accordingly ordered Gypsum Mines as employer to pay for Dale's 20% negligence.

That case is distinguishable from our present case in several aspects. To begin with, the suit was instituted by Stapley's widow possibly as administratrix of his estate against the mines which were vicariously liable for the negligence of Dale and therefore liable to pay

damages. The claim appears to have been brought for the loss to his estate. There is nothing on record to show that the case relates to the loss of consortium. Our present claim is strictly a dependency claim made by the children of the deceased for the loss of support from their mother, and, their mother's interest has not been properly represented during the hearing. Secondly, although Dale was not cited as a party, his interest in that case had been adequately represented by his employer whom it was alleged was vicariously liable for his negligence. Whereas in the present case not only was the deceased not cited as a party but her interest was not represented. Thirdly, in *Stapley's* case no claim was made against Dale himself and although his contributory negligence was considered by the Court it was for the sole purpose of determining the liability of his employer and not his own liability. In the present case, however, the consideration of the contributory negligence is for the purpose of reducing the claim of the dependants for something done by another person who is not a party. Lastly, in *Stapley's* case the mines being the employer were vicariously liable for the act of their employees. Therefore Dale's contributory negligence is vicariously the company's negligence and the company was before the Court as a party to the action. Whereas in the dependency claim before us the mother's contributory negligence cannot be taken as the negligence of her dependants.

On this issue of contributory negligence, I agree with Counsel for the plaintiffs that this Court should not make any finding of contributory negligence on the part of the deceased as she is neither a claimant, defendant nor a third party for the following reasons:-

The law of contributory negligence in this country is governed by s. 12(1) of the Civil Law 1956 which is identical to s. 1(1) of the United Kingdom's Law Reform (Contributory Negligence) Act 1945. The provisions of both read:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage:

It appears from the above section, damages should only be reduced by the Court after considering the **claimant's** share for the responsibility of the damage.

In *Mallett & Anor. v. Dunn* [1949] All ER 973, a married woman was injured through the negligence of the defendant. On the husband's claim for special damages, it was held that the husband's rights of action was not defeated by the wife's contributory negligence and that no reduction of this amount fell to be made under the Law Reform (Contributory Negligence) Act 1945.

The claimants in our present case, are the children; the contributory negligence was that of their mother. They have not been at fault themselves and therefore have no share of the responsibility for the damages. Their claim is for damages suffered as dependants and they cannot be classified as persons who have suffered damages "as a result partly of their own fault" within the meaning of s. 12(1) of the Civil Law Act 1956.

I find further support of the view that deceased has to be made a party and found liable before any assessment of contributory negligence could be made against her from the judgment of Ormerod LJ in *Maxfield v. Llewellyn case* (*supra*) at p. 1122 where his Lordship stated:

> It appears to me that the Court must have regard to a person's responsibility for the damage having regard to the parties who are before the Court, whose share of the damage can be taken into account and who have had the opportunity of putting arguments for and against their share of blame and generally of being heard in the action.

and further at p. 1123, UpJohn LJ said:

> It seems fundamentally contrary to the ideas of justice as administered in these Courts that this Court should have to assess liability for an alleged negligence which has never been alleged against the party responsible. Furthermore, on looking at the whole section I think it is clear that what the Court has to do is to assess the damage between those who have been found liable for it, and if somebody has not been found liable, surely then he must be excluded from the computation.

It has been an ingrained principle of our system of justice that no one is to be condemned, punished or deprived of his proprietary rights in any judicial proceedings unless he had an opportunity of being heard. This Court would be openly flouting the principle of *audi alteram partem* if we were to find the deceased liable for any degree of negligence without first giving her representative the opportunity to be heard, and the right to defend her actions. The proper course for the defendant to take in such a case before resorting to the remedy for contributory negligence is to make the estate of the deceased a party to these proceedings, either as a joint plaintiff or a third party. Their failure to do so must necessarily deprive them of the right of contribution for the plaintiffs who are merely claiming for the loss of dependency.

I will therefore make an award to the plaintiffs in respect of their dependency claim a sum of RM17,100 and the costs of this suit.

Also found at [1987] 1 CLJ 81